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11 UNITED STATES OF AMERICA
12 NATIONAL LABOR RELATIONS BOARD
13 REGION 31

14 ENCINO HOSPITAL MEDICAL CENTER-PRIME,) Case No. 31-CA-066945
15 Respondent,)
16 and)
17 SERVICE EMPLOYEES INTERNATIONAL UNION,) SEIU, UNITED HEALTHCARE
18 UNITED HEALTHCARE WORKERS – WEST,) WORKERS – WEST’S BRIEF IN
19 Charging Party.) SUPPORT OF EXCEPTIONS TO
) THE ADMINISTRATIVE LAW
) JUDGE’S SUPPLEMENTAL
) DECISION

1 The Charging Party, SEIU, United Healthcare Workers – West (the “Union” or “UHW”),
2 hereby submits the following in support of its exceptions to the Supplemental Decision of the
3 Administrative Law Judge, Gerald A. Wacknov.

4 **I. RESPONDENT TERMINATED PAT AGUIRRE BECAUSE OF HER UNION**
5 **ACTIVITY.**

6 Several witnesses testified to Pat Aguirre’s Union activities. For example, Pat Aguirre
7 testified to her Union support, specifically, Pat testified that during her 13 years of employment she
8 participated on three bargaining teams, was a chief shop steward, and also worked for the Union in
9 March 2001, for a short time after she was fired from October through February of 2012, and again
10 for a couple of weeks in April of 2012. Pat handled grievances and met with management on
11 various workplace issues. The most current contract negotiations that Pat was participating in were
12 the first negotiations for a collective bargaining agreement with Prime since it purchased and began
13 operating the Hospital. Pat was also featured in several Union flyers. Similarly, Richard Ruppert,
14 Union Representative, testified that “Pat was the Union” at the Encino Hospital. Kenton Smart,
15 per diem employee and Union steward, testified that Pat was the only steward for a long time until
16 Kenton became a steward in or about 2010. Kenton also testified that he had only handled one
17 grievance in the entire time that he was a steward. Finally, Maggie Macias, Union Representative
18 also testified about Pat’s substantial Union involvement. Yet, the ALJ completely disregarded all
19 of this evidence in error.

20 Most significantly, Pat testified at a hearing protesting the sale of Victor Valley Community
21 Hospital to Prime. Aguirre testified at the hearing about the changes in working conditions at
22 Encino Hospital since Prime purchased and began operating the Hospital. Present at that hearing
23 were Lex Reddy, Prime CEO; Susan Richards, Prime CNO, and the Ancillary person in charge of
24 Radiology at Encino and Sherman Oaks.

25 It should be no coincidence that at the next collective bargaining session between the Union
26 and the Hospital, Bob Bills, Encino Hospital CEO, said that it was the Union’s fault that Prime lost
27 the ability to purchase Victor Valley Community Hospital. Both Richard Ruppert and Pat Aguirre

1 testified to Bob Bills making this statement at the bargaining session on September 22, 2011.
2 Respondent obviously knew of Aguirre's active participation in the Union, so it is also no
3 coincidence, that less than one month later, on October 13, 2011, the Hospital terminated Aguirre.
4 These facts satisfy four of the elements set forth in *Wright Line*: (1) the employee's protected
5 activity; (2) Respondent's knowledge of that activity; (3) adverse action taken by the Respondent
6 against the employee; and (4) the timing of the adverse action.

7 The remaining elements are Respondent's animus against the Union and Respondent's
8 motivation in discharging the two employees. It is undisputed that "Prime Healthcare Foundation
9 (Prime) owns and operates Respondent." (ALJ Dec. at 2.) It is also undisputed that Prime had
10 animus toward the Union. Indeed, Respondent distributed flyers against the Union, entitled, "The
11 SEIU is DESTROYING Your Jobs." The flyer states:

12 Since its purchase Prime Healthcare has invested millions of dollars in
13 much needed capital equipment at Encino Hospital. But, instead of
14 working with hospital management, the SEIU has reacted by doing
15 everything possible to destroy the Hospital. It looks like they want to
16 ensure that Encino closes.

17
18 How do you gain anything if the SEIU is successful in destroying the
19 company that you work for? SEIU leaders are fond of talking about how
20 you are the union. If that's true, then its time to say ENOUGH! Tell the
21 SEIU leadership to start focusing on bargaining and stop using lies that
22 threaten to put Encino out of business.

23 Clearly, the statements by Bob Bills at the bargaining session in September and the flyer show the
24 Respondent's animus towards the Union. The ALJ, however, discredits the testimony of Richard
25 Ruppert about Bills statement at the bargaining session and fails to cite to Pat Aguirre's testimony
26 about Bills mentioning the Victory Valley sale during bargaining.

27 Furthermore, Respondent's motivation for terminating Pat Aguirre is shown by its lack of
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1 uniform application of imposition of discipline, failure to follow its own practice and its attempt to
2 create unfounded reasons and justifications for the discharge. For instance, Richard Ruppert
3 testified that he met with the former Human Resources representative, Gail Brow, who explained
4 to Ruppert that progressive discipline and how it was imposed was based on each type of
5 misconduct. Additionally, the very action that Pat engaged in - where Back claims Pat "lied" and
6 therefore merited termination - was in her capacity as Union steward. In the course of Pat's
7 representation of Arse involving Arse's termination, Pat reached an agreement with Gail Brow, the
8 former Human Resources representative, that the Hospital would not challenge Arse's ability to
9 collect unemployment benefits. The actions Pat took in attempting to confirm whether or not the
10 Hospital was going to keep to its end of the bargain, i.e. by not challenging Arse's unemployment
11 benefits, were actions done in her capacity as a Union steward. Yes, admittedly, Pat attended the
12 unemployment hearing with Arse both as a friend and steward, but Pat's attendance at the
13 unemployment hearing is a red herring and irrelevant to the determination of whether Pat was
14 illegally fired for her Union activity. Instead, it was Pat's alleged conversations with Soto and
15 Armenia that Pat "lied about" that Respondent used as a pretext to fire Pat.

16 Indeed, the General Counsel introduced several examples of discipline imposed by the
17 Hospital that showed a practice by the Hospital as to imposition of progressive discipline based on
18 the same type of conduct. (GC Exh.'s 26, 27, 28, 29 & 30.) Furthermore, Respondent's own
19 witness, Thomas Callahan testified that discipline and whether to move to the next level depends
20 on the circumstances. Callahan testified that serious situations, such as dangerous situations,
21 would call for more serious discipline. Respondent's own lack of uniformity in the imposition of
22 discipline illustrates that Respondent's stated reason for the discharges was a pretext. *See*
23 *McBurney Corp.*, 351 NLRB 799, 800 (2007) (employer "fatally undermined by the fact that ... it
24 used the priority hiring system selectively and systematically to avoid the hiring of union
25 applicants"); *Zurn/N.E.P.C.O.*, 345 NLRB 12, 16-17 (2005) (employer deviated from long-standing
26 policy in discriminating against union applicants), review denied, 154 Lab. Cas. P 10,881 (6th Cir.
27 2007); *Toll Mfg. Co.*, 341 NLRB 832, 833 (2004) (employer failed to follow its own progressive

1 discipline system); *Embassy Vacation Resorts*, 340 NLRB 846, 848-49 (2003) (animus shown by
2 employer's failure to give employees a chance to defend themselves and its deviation from its past
3 practice of discipline), pet. for review dismissed, 2004 WL 210675 (D.C.Cir. Jan 28, 2004);
4 *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn.1(2003) (employer failed to follow its
5 progressive discipline policy), affd. 177 L.R.R.M. (BNA) 2447 (6th Cir. 2005). Yet, the ALJ
6 completed disregarded Callahan's testimony, discredited Ruppert's testimony concerning
7 progressive discipline, and instead found Back credible concerning the Hospital's application of
8 progressive discipline. The ALJ should conclude that Respondent discharged Pat Aguirre in
9 violation of Section 8(a)(3) of the Act.

10 II. THE CREDIBILITY OF RICHARD RUPPERT, PAT AGUIRRE AND BACK.

11 The ALJ discredits the testimony of Union Representative, Richard Ruppert, when that
12 testimony supports the Charging Party's case, yet, inexplicably credits Rupperts testimony to
13 support an arbitrary finding that Back did not act with pretext when she terminated Pat Aguirre.
14 On the other hand, the ALJ overwhelmingly credited Back's testimony. Here, it is hard to believe
15 that Back is going to admit to firing Pat Aguirre for Union activity as she was one of the decision
16 makers and could be found to have violated Section 8(a)(3). Clearly, Back, too, has an incentive to
17 lie in order to avoid liability, yet the ALJ blindly credited all of Back's testimony. In fact, Pat's
18 alleged dishonesty involved an insignificant matter that did not make much of a difference in her
19 ability to perform her job. More importantly, Pat's alleged dishonesty was done in the course of
20 Pat's actions as a Union steward – following up on an agreement with management involving the
21 termination of Arse. The ALJ, therefore, erred in finding that Pat Aguirre was not engaged in
22 protected concerted activity when she was acting as a union steward representing Arse. The ALJ
23 should not have credited Back and discredited Ruppert and Aguirre.

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III. CONCLUSION

Based on the above and the exceptions filed by Charging Party, the Charging Party seeks appropriate remedies as reflected in the Exceptions, including the return of Ms. Aguirre to work with backpay and interest, and a reading by company officials to the employees.

Dated: June 18, 2013

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: 

MONICA GUIZAR
Attorneys for Charging Party
SEIU, United Healthcare Workers – West

125335/681411

1 **PROOF OF SERVICE**
2 **(CCP §1013)**

3 I am a citizen of the United States and resident of the State of California. I am employed in
4 the County of Los Angeles, State of California, in the office of a member of the bar of this Court,
5 at whose direction the service was made. I am over the age of eighteen years and not a party to the
6 within action.

7 On August June 18, 2013, I served the following documents in the manner described
8 below:

9 **SEIU UNITED HEALTHCARE WORKERS-WEST'S BRIEF IN SUPPORT OF
10 EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL
11 DECISION**

12 ✓ [X] (BY U.S. MAIL) I am personally and readily familiar with the business practice
13 of Weinberg, Roger & Rosenfeld for collection and processing of correspondence
14 for mailing with the United States Parcel Service, and I caused such envelope(s)
15 with postage thereon fully prepaid to be placed in the United States Postal Service
16 at Los Angeles, California.

17 On the following part(ies) in this action:

18 Original to: Lester A. Heltzer
19 Executive Secretary
20 National Labor Relations Board
21 1099 14th Street, N.W.
22 Washington, D.C. 20570

23 Copies to:

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25 I declare under penalty of perjury under the laws of the United States of America that the
26 foregoing is true and correct. Executed on June 18, 2013, at Los Angeles, California.

27
28
Melanie Garlon